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JOHN F. DAVIS, C

No. 970

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

FEDERAL TRADE COMMISSION, *Petitioner*

v.

DEAN FOODS COMPANY AND BOWMAN DAIRY COMPANY, *Respondents*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT DEAN FOODS COMPANY IN OPPOSITION

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Dated: February 9, 1966

La Salle Street Press—Chicago 60610

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BRIEF FOR RESPONDENT DEAN FOODS COMPANY IN OPPOSITION

QUESTIONS PRESENTED

The petition for a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit, which denied the Federal Trade Commission's request for preliminary injunctive relief against the sale of the operating assets of the Bowman Dairy Company to Dean Foods Company, asserts that only one question is presented—that of the standing of the Commission to seek a preliminary injunction from the Courts of Appeals under the "all writs" statute, 28 U.S.C. §1651(a) (Pet., p. 2). However, the Commission, itself, recognized below that a preliminary injunction cannot issue, even assuming jurisdiction, unless there is a "likelihood of ultimate Government success on the merits" (Comm. Mem., p. 16). Accordingly, the

threshold question raised by the petition is whether this is an appropriate case to test the Commission's extraordinary request for a preliminary injunction, considering that (a) Bowman's operating reverses were so severe prior to the sale that its owners would have liquidated its dairy business in any event; (b) the sale has been consummated and a reconstitution of Bowman is no longer practical; (c) the sale will have significant competitive benefits for smaller dairies, milk producers and customers; and (d) irreparable injury will be caused Dean if it is compelled to preserve the acquired assets in status quo pending a full hearing on the merits.

Because the record so conclusively demonstrates that the Commission will be unable to sustain its case on the merits and that its motion for a preliminary injunction must be denied in any event, there is in fact no real occasion to reach the question of whether the Commission may secure a preliminary injunction from the Courts of Appeals when Congress, three Circuits, all the commentators and the Commission, itself, have recognized that it has no standing to seek such relief, and the only case cited to the contrary is admitted by the Commission to be "distinguishable".[1]

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[1] Dean has attempted from the outset to reach the merits of the controversy but has been rebuffed by the Commission, whose major concern has been to use this proceeding as a "test case" for its jurisdictional theories. Thus, when respondents argued these points to the Court of Appeals, the Commission accused them of "invit[ing] the Court to put aside the jurisdictional question and instead deny on the merits." (Transcript, p. 116.)

STATEMENT

Following five years of declining sales, mounting operating losses and frustrated efforts at internal rehabilitation, Bowman, on December 13, 1965, entered into an agreement to sell its operating assets to Dean (Kullman Aff., pp. 1-3).[2] In the Chicago metropolitan market, where the bulk of Bowman's business was located (and the Commission has elected to rest its case), Bowman's sales had declined from $56.8 million in 1960 to $46.6 million in 1964, or about 18% (*id.*, p. 3). Its losses had risen during the same period from $197,000 to $1,572,000 (*ibid.*)

Every indicator pointed to a further deterioration in Bowman's financial and operating plight. The company had long been committed to home milk delivery, where the consumer shift to store purchasing had resulted in disastrous sales losses (*id.*, pp. 2, 3). Bowman's inability, despite strenuous management efforts, to build adequate store volume to offset these home delivery losses had, in turn, led to steadily rising costs (*id.*, pp. 3-6). And, in an industry where modern production facilities are essential to continued competitive vitality, Bowman's plants and equipment had become increasingly obsolescent. Significant capital improvements had been made only in the Chicago plant, where, despite the completion of a million dollar modernization program in 1964, continued losses were anticipated (*id.*, pp. 7, 8).

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[2] Six weeks prior to the formal execution of the purchase agreement, respondents, *on their own initiative*, brought to the attention of the Commission's staff all of the essential facts relating to the transaction which were later set forth in their affidavits filed with the Court of Appeals and to which reference is made in this Statement. (See p. 5, *infra*.) After a thorough investigation, the Commission was unable to controvert these facts in any material respect.

Faced with the prospect of increasing operating losses and the absence of an internal solution to its problems, Bowman's management and shareholders concluded that an effort had to be made to find a buyer for the company's dairy business and, in the event none was available, to effect a piecemeal liquidation as rapidly as possible (*id.*, pp. 11, 12).[3] Approaches were made to the only prospective purchasers which Bowman believed could reasonably be expected to make an offer (*id.*, pp. 12, 13). Only Dean expressed any interest and it was willing to pay less than two-thirds of Bowman's net worth (*id.*, p. 13).

Although Dean had shown a modest growth in recent years, both its sales and profits had declined in 1964 and, as a medium-sized regional dairy, it was dwarfed by the giant national firms. (Compare Dean Aff., pp. 1-3 with *Beatrice Foods Co.*, Trade Reg. Rep., 1963-1965 Transfer Binder, ¶17,244 at p. 22,325 (FTC 1965)). While Dean accounted for approximately 7% of the Chicago market, over three-quarters of its business was with a single customer, Jewel Tea Company, which had recently disclosed its plans to open its own dairy plant (following the lead of other corporate and cooperative food chains) and to terminate its supply arrangements with Dean (Dean Aff., pp.

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[3] Bowman's stock was closely held, with nearly a third in the hands of two elderly widows, one of whom had recently died. The Senior Trust Officer for the Northern Trust Company of Chicago, which acts as Co-Executor, stated that it had "carefully and independently evaluated [the] future income requirements" of the estate and had "concluded that the continued operation of Bowman's dairy business on its present basis was unwarranted and that these operations should preferably be sold as a package or, if necessary, liquidated on a piecemeal basis and the funds generated from such a sale or liquidation re-invested elsewhere." (Turner Aff., pp. 1, 2. See also Clark Aff., p. 2 and Bowman Aff., p. 1).

1-3).[4] To counter this severe threat to its operating efficiency and competitive vitality, Dean decided to commit a sum equal to nearly its entire net worth to the purchase of Bowman's assets. Dean hoped that by disposing of Bowman's home delivery routes to smaller dairies equipped to service them at a profit and by effecting cost-cutting consolidations of Dean and Bowman operations, it could operate the remaining Bowman business at a profit and thereby offset the loss of the Jewel account (*id.*, p. 4).

All these matters were brought to the attention of the Commission's staff well in advance of the execution of the purchase agreement in mid-December so that the Commission could have an opportunity to investigate fully the proposed sale (Jentes Aff., pp. 1-3). Additionally, the staff was invited to suggest any modifications in the transaction, short of its complete abandonment, which would make it acceptable to the Commission (*id.*, p. 5). However, the Commission declined to pursue discussion of any alternatives and, on December 22, 1965, filed its administrative complaint charging that the proposed sale violated Section 7 of the Clayton Act, 15 U.S.C. §18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. §45. This was followed, on December 30, 1965, by the Commission's petition to the Seventh Circuit praying for (a) a preliminary injunction against the closing of the transaction pending completion of the administrative proceeding and (b) a temporary restraining order until five days after the Court of Appeals issued its ruling. On January 4, 1966, the Court of Appeals entered the temporary restraining order requested by the Commission.

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[4] In this connection, attention is invited to the confidential letter recently forwarded to the Commission which has been filed with the Clerk of this Court.

In opposition to the Commission's petition, the respondents filed affidavits detailing the facts set forth above concerning Bowman's operating reverses and decision to liquidate and Dean's reasons for making the purchase. They also showed that after the loss of the Jewel account and the sale of Bowman's home delivery routes to other dairies in the Chicago area, the acquisition would give Dean a market share which was less than half the 23% share of the market accounted for by Dean and Bowman before the sale and well below the 16% formerly enjoyed by Bowman alone (Dean Aff., p. 5). In addition, respondents filed the affidavits of the Executive Secretary of the Associated Milk Dealers of Chicago, which represents substantially all dairies in the market, the General Manager of the Pure Milk Association, a cooperative composed of dairy farmers supplying the major part of the milk to the area, and the Chairman of Grocerland Co-Operative, a large independent retail grocers' cooperative. These established that (a) "prices to farmers will not be affected by Bowman's sale of its dairy operations to Dean because prices to farmers are determined through a Federal order and a superpool" (McWilliams Aff., p. 1); (b) there is "no likelihood that Dean's acquisition of Bowman's dairy operations will give it the market power to charge other than competitive prices . . . [since] there are many alternative milk suppliers" to whom customers "could turn should this unlikely event occur" (Karlos Aff., p. 1); (c) there are presently "a large number of aggressive and vigorous dairies in the Chicago market and . . . competition has been increasing rather than decreasing" (Nonnamaker Aff., p. 2); (d) in view of the trend by some large supermarket firms toward ownership of their own dairies, "if independent grocers . . . are to remain competitive with such vertically integrated chains, they must be able to purchase their milk from efficient independent dairy companies" and Dean's purchase

will enable it "to remain competitive in the dairy industry and to supply independent grocers with milk at the lowest possible prices" (Karlos Aff., p. 2); (e) in short, the acquisition can have "no conceivable adverse effects on other milk processors or distributors, on milk producers, on milk consumers or on competition generally" (Nonnamaker Aff., p. 2; McWilliams Aff., p. 2; Karlos Aff., p. 1). In fact, Dean's plan to sell off the Bowman home delivery routes to smaller dairies "will significantly strengthen the competitive vitality of these firms by giving them an opportunity to reduce their distribution and processing costs and increase their operating efficiency" (Nonnamaker Aff., p. 2).[5]

On January 19, 1966, the Court of Appeals, after oral argument and extensive briefs on both the merits and the jurisdictional issue, denied the Commission's petition on the ground that "the Commission did not have authority to institute this proceeding in this court" (App. A to Pet., p. 21). Further, with knowledge that the parties were committed to consummate the transaction once the court proceedings were dismissed, the Court vacated its previous order which had stayed the closing until five days after entry of its judgment. The transaction was, accordingly, closed on January 19, at the time specified in the agreement as extended. Pursuant to the agreement, Dean took title to Bowman's plant, equipment, inventory and accounts receivable. Bowman, however, retained all cash and marketable securities, which had constituted the company's working capital.

On January 24, 1966, Mr. Justice Clark stayed any further material changes in Bowman's operations or assets pending a decision on the instant petition, with the excep-

[5] Despite its canvass of the Chicago market, the Commission was unable to secure a single affidavit to the contrary from any dairy competitor, milk supplier or customer.

tion that Dean was authorized to dispose of Bowman's home delivery routes. The sale of those routes is presently being effected.

REASONS FOR DENYING THE WRIT

The Federal Trade Commission, in its zeal to treat this case as a vehicle for testing its theory, now rejected by three Circuits, that the Courts of Appeals should be transformed into a forum for hearing the Commission's preliminary injunction requests, has utterly ignored the realities of the transaction at issue. Its entire case, predicated on a quixotic hope of keeping Bowman intact as a viable competitor, is undercut by the simple facts that (a) Bowman's operating reverses had reached such proportions prior to the sale that its owners had decided to withdraw from the dairy business regardless of whether they were able to sell to Dean, and (b) now that the transaction has been closed and this Court has authorized the disposition of half of Bowman's Chicago operations, there is no realistic basis on which Bowman could be reconstituted. Indeed, assuming a reconstitution were conceivable, the result would be less, not more effective competition. In short, while there is no colorable basis for the Commission's jurisdictional claims, the absence of any reasonable probability that a preliminary injunction would issue makes this an inappropriate case to test out its theories in any event.

1. **This is not an appropriate case to test the Commission's jurisdictional theory, since it is not entitled to a preliminary injunction under any circumstances.**

   a. **There is no way Bowman can be kept alive as an effective competitor in the dairy industry.**

The Commission's petition for a writ makes repeated reference to "re-establish[ing] Bowman as a viable firm and effective competitor in the Chicago packaged milk

market" (pp. 10, 4, 8). In is an unreasoned hope that has led the Commission to proceed from the outset of this case on the mistaken premise that Bowman could be kept in the dairy business if the sale to Dean could be thwarted. Quite apart from the fact that a company which is losing over a million dollars a year in the Chicago market is hardly "a viable competitor," the Commission has ignored the uncontroverted statements of responsible Bowman officials and shareholders that they had concluded that the company's dairy operations would have to be terminated even if the sale to Dean did not go through. Simply put, Bowman had reached the point where the continuation of its dairy business was merely throwing good money after bad. Thus, the result for which the Commission argues is a futile one; even if Bowman could be "re-established", its owners would proceed with a piecemeal liquidation on their own.[6]

If it was futile to think of maintaining Bowman as an effective competitor before the sale of its operating assets to Dean, it is even more unrealistic to think that the particular assets involved here could be kept in limbo pending lengthy hearings before the Commission and the courts on the merits and then converted into a "going concern" at some future date (Pet., p. 10). This Court has already given some recognition to this fact by authorizing the sale of the former Bowman home delivery routes, and that business (which accounted for 50% of Bowman's Chicago sales) will shortly be irretrievably disposed of. Other press-

[6] The Commission's intimation (Pet., p. 9, n. 7) that Bowman's shareholders and management were apparently deceived about the straitened financial condition of their own company is patently absurd. The company's sharp sales decline, its mounting operating losses and its bleak prospects speak for themselves.

ing problems remain. As long as the future of the former Bowman operations remains uncertain, key employees and customers are subject to loss at any time. In addition, steps must be taken to scrap outmoded Bowman plant and equipment, and other Bowman operations must be integrated with those of Dean if necessary cost-cutting is to be effected and Dean is to salvage its heavy commitment to the Bowman transaction.

It would, in short, be unjust as well as unrealistic to force upon Dean the vain task of trying to keep assets, which had collectively been generating substantial losses prior to the sale, intact over an extended period of time pending an eventual ruling on the merits. The Court of Appeals, after a full hearing and with knowledge of the irreparable injury which would result from further delays, deliberately lifted its prior order staying the closing until *five days after* its ruling. Under the terms of the agreement, the vacation of the stay left Dean no alternative but to proceed with the closing or be in default under the contract. It would be harsh to saddle Dean, which had been authorized to proceed by the Court, and required to do so by the contract, with the losses inherent in a further stay, on the very dubious assumption that the Commission will prevail on the merits and in the utopian belief that Bowman could be reconstituted as a going concern in the dairy business.

b. Even if Bowman could be reconstituted, the result would be less, not more, effective competition.

The Commission's futile gesture at a reconstitution of Bowman is particularly misplaced since the sale of Bowman's dairy operations to Dean can only lead to significant competitive benefits. The fantasy which the Commission has conjured up of an amalgam of two industry giants

threatening the foundations of competition in the dairy industry bears no likeness to the real competitive effects of this transaction. As is conclusively shown by the undeniable facts of record, concentration will decrease, not increase; smaller dairies, milk producers and customers will be benefited, not harmed; and competition generally will be strengthened, not weakened.

Blindly focusing on its own statistical sleight-of-hand instead of the incontestable competitive realities, the Commission has assumed that because Bowman had 16% of the Chicago market before the sale and Dean had 7%, the acquisition must result in a combined market share of 23%, with Dean "the leading seller in the market by a substantial margin" (Pet., p. 9). Two facts refute this assumption: (a) Dean is already in the process of reselling the home delivery routes which accounted for 50% of Bowman's Chicago sales volume to smaller dairies in the market, and (b) Dean stands to lose its largest customer, which presently accounts for 75% of Dean's Chicago sales. The net effect will be to leave Dean with a market share only slightly larger than it had before the acquisition, and well below that which was enjoyed by Bowman *alone*. In fact, with the loss of the Jewel account, Dean would be an insignificant factor in the Chicago market absent the acquisition.

Because of these developments, the sale will also result in a substantial *decline* in the share of total sales "accounted for by the first four sellers" in the market (Pet., p. 9). The position of all other dairies, on the other hand, will increase from 58% to as much as 70% or more of the Chicago market. Consequently, the acquisition will continue the trend toward declining concentration in the Chicago market already evident in statistics compiled by the Department of Agriculture showing that the share of the four largest

dairies had dropped from 52% in 1954 to 42.3% in 1961.[7] Additionally, the acquisition will help to counter any attrition in the number, as opposed to the market share, of smaller dairies (see Pet., p. 9), since Dean's disposition of the former Bowman home delivery routes will enable these smaller firms to effect greater distribution and production efficiency.

To the extent that the Bowman volume which Dean may hope to retain offsets the loss of the Jewel account and gives Dean the wherewithal to maintain its position as an effective regional competitor, the acquisition serves a purpose which the Commission itself has stressed—that of developing "a strong and healthy middle tier of medium-sized dairy companies capable of offering vigorous competition to the giant firms." *Beatrice Foods Co., supra,* p. 22, 337.[8] It will also permit Dean to maintain the efficiency required to supply low-cost dairy products to independent grocers, thereby enabling them to remain competitive with corporate and cooperative supermarket chains owning their own dairy facilities.

Finally, since Bowman would have gone out of business in any event, it is unrealistic to view the transaction as either eliminating a competitor or having an adverse effect on competition. *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 319 (1962); *International Shoe Co.* v. *Federal Trade Com-*

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[7] Dept. of Agriculture, MARKET SHARES IN FLUID MILK MARKETS 30 (rev. ed. April, 1964). Statistics for the period since 1961 are not available.

[8] Dean is just such a firm. The Commission's frequent references to Dean as the "12th largest dairy" overlook the substantial "disparity in size between the eight or nine largest [dairies] and even the larger independents" noted in the *Beatrice* opinion (*id.* at p. 22,326).

mission, 280 U.S. 291 (1930); *Beegle* v. *Thomson*, 138 F.2d 875 (7th Cir. 1943); *Northwest Airlines, Inc.* v. *C.A.B.*, 303 F.2d 395 (D.C. Cir. 1962); *United States* v. *Gimbel Bros.*, 202 F. Supp. 779 (E.D. Wis. 1962); *United States* v. *Ling-Temco Electronics, Inc.*, 1961 Trade Case 78,621 (N.D. Tex.). Contrary to the Commission's argument (Pet., p. 9, n. 7), none of these cases requires that the acquired company be in actual bankruptcy, providing its competitive vitality has been significantly impaired and there are no indications of any other anticompetitive effects.[9]

In light of these facts, it is little wonder that all of the industry witnesses (representing milk suppliers, customers and competing dairies) agreed that the Bowman sale could have no adverse effects on competition and would, on the contrary, have significant competitive benefits. The very real doubt which has thus been cast on the Commission's ability to sustain its Section 7 and Section 5 contentions provides still a further reason why this is a particularly inappropriate test case for the Commission's novel jurisdictional theories.

2. The Commission's theory that the Courts of Appeals should be turned into a forum for hearing preliminary injunction motions is impractical and legally unsupportable.

Even the Commission's rhetoric cannot obscure what Congress, the commentators and the Commission, itself, have consistently recognized—that the Commission has no power to seek preliminary injunctive relief against alleged violations of the antitrust laws, either from the Courts of Ap-

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[9] As for the Commission's implication that another bona fide purchaser was available (Pet., p. 9, n. 7), this contention was thoroughly discredited before the Court of Appeals (Resp. Br., pp. 16, 17; Schaub, p. 1; and Roney, p. 1).

peals or elsewhere. Since three circuits have now confirmed that conclusion and the lone authority relied on by the Commission is admittedly distinguishable, there is neither an important question nor a conflict among circuits which requires review by this Court.

The Commission's argument (Pet., p. 15) that "it would be anomalous for the availability of relief *pendente lite* to depend on whether suit under the Act was brought by the Department of Justice or the Federal Trade Commission," loses sight of the fact that when Congress enacted the antitrust laws, it made "careful and deliberate provision" for a scheme of dual enforcement. It assigned to the Department of Justice the task of criminal prosecution under Sections 1 through 3 of the Sherman Act, 15 U.S.C. §§1-3, the right to recover damages on behalf of the United States under Section 4A of the Clayton Act, 15 U.S.C. §15(a), and the power to obtain equitable relief, including injunctions against threatened violations of the antitrust laws, under Section 4 of the Sherman Act, 15 U.S.C. §4, and Section 15 of the Clayton Act, 15 U.S.C. §25. The Commission on the other hand, was authorized to proceed administratively under Section 11 of the Clayton Act, 15 U.S.C. §21, with power to hold its own hearings and to issue cease and desist orders. Congress made no provision for the issuance of preliminary injunctions by the Commission, itself, or for its application to any court for such injunctive relief.[10] Indeed, the Commission was not even authorized to issue a complaint against a threatened violation of the antitrust laws—as it has attempted in this case—since its authority under Section 11(b) was

[10] Compare Section 5(9) of the Interstate Commerce Act, 49 U.S.C. §5(9), authorizing the ICC to seek injunctive relief from the district courts against alleged violations of the Interstate Commerce Act.

limited to instances where the respondent "is violating or has violated" the Clayton Act.[11]

Congress was equally precise concerning the jurisdiction of the Courts of Appeals with respect to proceedings brought by the Commission. It provided in Section 11(c) of the Clayton Act that the jurisdiction of the Courts of Appeals should attach only *after* the Commission had issued a cease and desist order and a petition had been filed for its review.

In view of the elaborate care with which Congress spelled out the enforcement scheme which it intended for the antitrust laws and the specific delineation it gave to the role of the Commission and the Courts of Appeals in that scheme, it is absurd to argue, as the Commission does here (Pet., p. 11), that Congress nonetheless intended to give the Commission, through the generalized provisions of the "all writs" statute, 28 U.S.C. §1651(a), the very power it so consciously withheld when it dealt specifically with the Commission's power in the antitrust statutes. This conclusion is confirmed by the amendatory action which Congress has taken with respect to that legislation on at least three separate occasions:

First, in 1938, Congress amended the Federal Trade Commission Act to provide in Section 13, 15 U.S.C. §53, for an express grant of authority to the Commission to apply

[11] "The FTC cannot even issue its complaint until a merger or acquisition has been consummated; it has no power to block a merger entirely." Note, *Preliminary Relief for the Government Under Section 7 of the Clayton Act,* 79 Harv. L. Rev. 391, 404 (1965); *Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary on H.R. 9424,* 84th Cong., 2nd Sess. 465 (1956); *cf. United States* v. *Union Oil Co.,* 343 F.2d 29, 31 (9th Cir. 1965).

to the district courts for temporary injunctive relief against the dissemination of false advertisements. Not only does this show that where Congress wished to grant the Commission the right to secure a preliminary injunction it specifically so provided, but it also reveals that Congress did not believe that, absent an express legislative grant, the "all writs" statute conferred such authority on the Commission.

Second, in 1959, Congress amended Section 11 of the Clayton Act to provide for the issuance by a Court of Appeals of such writs as are "necessary in its judgment to prevent injury to the public or to competitors *pendente lite.*" 73 Stat. 243. However, Congress did not disturb the jurisdictional prerequisite that the Commission should first have completed its administrative proceedings and a petition for review of its order should have been filed with the court. See 15 U.S.C. §21(c). The failure of Congress to broaden the jurisdiction of the Courts of Appeals in this respect is particularly significant since the Commission had only recently been twice rebuffed by the courts in its efforts to secure a preliminary injunction pending the completion of its administrative proceedings. *Federal Trade Commission* v. *International Paper Co.,* 241 F. 2d 372 (2nd Cir. 1956), and *Federal Trade Commission* v. *Farm Journal, Inc.* (3rd Cir. 1955, unreported).[12]

Third, in 1956 and again in 1965, Congress refused to enact legislation, submitted at the behest of the Commis-

[12] For a discussion of the *Farm Journal* decision, see *Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary on H.R. 9424, supra,* where the then Chairman of the Federal Trade Commission, Judge Gwynne, noted that "the Commission's petition was summarily denied by the court" (p. 465).

sion, which would have given the Commission the right to obtain a preliminary injunction against alleged violations of the antitrust laws.[13] This refusal to broaden the Commission's enforcement authority cannot be dismissed as mere "legislative inaction" (Pet., p. 13), for it was accompanied by an explicit Congressional recognition that the Commission did not have the power to obtain such preliminary relief.[14] For example, H.R. Rep. No. 1889, 84th Cong., 2nd Sess., noted the "lack of a provision to enable the Commission to prevent mergers prior to consummation or, after consummation, to take action to preserve the status quo until completion of proceedings." (p. 4). Likewise, the Staff Report of the Senate Subcommittee on Antitrust and Monopoly remarked that "the Federal Trade Commission now lacks the power to seek restraining action of a court to prevent consummation of a proposed merger or acquisition or to maintain the status quo," but it also observed that the Commission "does have the right to request the Attorney General to seek such action on its behalf." S. Rep. No. 132, 85th Cong., 1st Sess. 53.

The Commission's present position that no significance should be attached to this repeated rejection of its legis-

[13] See H.R. 9424, S. 3341 and S. 3424 submitted in the 84th Cong., and H.R. 49 and H.R. 1574 in the 89th Cong. The Commission observes (Pet., p. 13, n. 12) that these bills would have granted the Federal Trade Commission the right to seek preliminary injunctive relief from the district courts or to issue such injunctions on its own, rather than the right to apply to the Courts of Appeals for such relief. However, this only serves to underscore the Commission's own recognition that the Courts of Appeals are an inappropriate forum for the hearing of preliminary injunction proceedings (see p. 23, *infra*).

[14] Moreover, the House did pass H.R. 9424 in 1956, but it failed to gain the approval of the Senate.

lative proposals, since Congress purportedly contemplated that the Commission would have a right to preliminary injunctive relief in any event, is in striking contrast to the representations which it has made to Congress.[15] Thus, the Chairman of the Commission advised the Senate Judiciary Committee in 1956 that there was no "provision which enables the Federal Trade Commission either to take action to prevent mergers prior to consummation, or after consummation, to take action to preserve the status quo until completion of administrative proceedings before the Commission." Hearings Before the Subcommittee on Antitrust and Monopoly, *supra*, p. 463. In 1960, the Commission's Chairman reiterated this view. Kintner, *The Federal Trade Commission in 1960—Apologia Pro Vita Nostra*, 1961 Antitrust Law Symposium 21, 41. And as recently as the Commission's Annual Report for 1964, it again called attention to the need for legislation authorizing it to obtain pre-hearing injunctive relief. 1964 Fed. Trade Comm. Ann. Rep. 33. It is also significant that §1.112 of the Commission's own Rules of Practice makes no provision for the type of preliminary injunctive proceeding which it has attempted to institute in this case, but only for application to the Courts of Appeals after a "petition for review of an order to cease and desist has been filed."

The commentators have, without exception, agreed that the Commission had no standing to seek a preliminary injunction. For example, the present Assistant Attorney General in charge of the Antitrust Division, who has joined in the Commission's petition to this Court, has recognized that absent amendatory legislation the Commission does not have the "power (which the Department of Justice has

[15] It also appears unreasonable to assume that the Commission would have expended such effort to secure legislation which it now argues is superfluous.

now) to seek a preliminary injunction in any Federal District Court." Kaysen & Turner, ANTITRUST POLICY 258 (1959). See, also, Comment, *Preliminary Injunctions and the Enforcement of Section 7 of the Clayton Act*, 40 N.Y.U. L. Rev. 771 (1965); Note, *Preliminary Relief for the Government Under Section 7 of the Clayton Act*, 79 Harv. L. Rev. 391, 402-405 (1965); Comment, 32 N.Y.U. L. Rev. 1297 (1957).

Finally, the only three Circuits which have ruled upon the jurisdictional issue presented here—the Seventh in the instant case, the Second in *International Paper* and the Third in *Farm Journal*—have concluded that the Commission has no power to seek a preliminary injunction under the "all writs" statute. As previously noted, the Third Circuit "summarily denied" the Commission's petition without an opinion. The Second Circuit, however, treated each of the contentions made to this Court and rejected them out of hand. It reasoned that "the specific provisions as to who may seek injunctive relief, and in what courts, imply that the Commission itself is not authorized to do so." 241 F. 2d at 373. In fact, "[t]his implication is required by the statutory provisions" pursuant to which the Courts of Appeals acquire jurisdiction "only after the administrative proceeding has been concluded" (*ibid.*). "[S]ince the pattern of enforcement adopted by the Congress in the Clayton Act makes clear that the Commission was not intended to have such authority, the 'all writs' section cannot be invoked to circumvent this limitation" (*ibid.*).

The "conflict among circuits" (Pet., p. 18) which the Commission contends is posed by the decision of the Ninth Circuit in *Board of Governors* v. *Transamerica Corp.*, 184 F. 2d 311 (1950), *cert. den.* 340 U.S. 883 (1950), is a transparently

artificial one. The Commission, itself, in the application for preliminary injunction which it filed with this Court, characterized the case as "distinguishable" (p. 6).[16] *Transamerica* involved a complaint under Section 7 of the Clayton Act prior to the 1950 amendment which made it applicable to asset acquisitions. At that time it was possible, even after administrative hearings had been commenced, for a respondent completely to oust the agency of its jurisdiction by transferring the assets of a corporation whose stock had been acquired to a different entity. See, *e.g. Arrow-Hart & H. Co.* v. *Federal Trade Commission*, 291 U.S. 587 (1934). The Ninth Circuit's holding that it had power under the "all writs" statute to enjoin such a threatened transfer was thus predicated on the fact that otherwise the jurisdiction of both the Board of Governors and the Court of Appeals would have been irretrievably lost. That the court did not view its action as comparable to a preliminary injunction is borne out by its observation that it had issued its writ "not as an injunction in equity, however much equitable principles must be applied, but solely as a writ in aid of the jurisdiction of this court." 184 F. 2d at 317.

The situation presented by *International Paper, Farm Journal* and the present case is entirely different. There is no action which the respondents can take which will result in any loss of jurisdiction either by the Commission or the Court of Appeals. The Commission will be able to proceed with its hearings regardless of whether its petition is denied and the Court of Appeals will similiarly have an opportu-

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[16] Aside from casting considerable doubt on the validity of *Transamerica*, the commentators have also uniformly recognized that it presents no real conflict with the situation presented here. Note, *Preliminary Relief for the Government Under Section 7 of the Clayton Act*, 79 Harv. L. Rev. 391, 405 (1965); Comment, 32 N.Y.U. L. Rev. 1297, 1299, 1300 (1957).

nity to review any Commission order which may be entered on the merits.

The cases, other than *Transamerica*, on which the Commission relies (Pet., pp. 11, 12) are equally inapposite. Certainly they do not support its contrived argument that an issue of jurisdictional impairment is raised because it will allegedly be unable to issue what it views as "an effective order" (Pet., p. 17). Those cases either deal with situations where, absent injunctive relief, the court's jurisdiction would have been totally defeated, or merely recognize the inherent power of a court to preserve the status quo in a matter already pending before it. Indeed, the only cases remotely in point are *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 30 (1943), in which this Court observed that "where the appeal statutes establish the conditions of appellate review, an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions . . ." and *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658 (1963), where this Court, in the very footnote cited by the Commission, pointed out that even the limited power ordinarily available to preserve a court's jurisdiction "has never been recognized in derogation of . . . a clear Congressional purpose to oust judicial power . . ." 372 U.S. at 671, n. 22.[17]

Equally lacking in merit is the Commission's argument that a denial of preliminary injunctive relief will "disable the Commission from effectively proceeding in a significant

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[17] *Cf.* Note, *Preliminary Relief for the Government Under Section 7 of the Clayton Act*, 79 Harv. L. Rev. 391, 403 (1965):

> "Preliminary procedures available to an agency to prevent a regulated company from exercising control over another such company through stock ownership depend in each case upon the particular statutory framework in which the agency operates; the Clayton Act provides for no such procedures."

number of important merger cases" (Pet., p. 6). No practical problems are in fact raised by a Commission request that the Department of Justice proceed in its stead. This is the procedure which has been followed for over five decades, and the Department is certainly no stranger either to merger cases or to the dairy industry. See, *e.g.*, *United States* v. *Borden Co.*, 347 U.S. 514 (1954), and *United States* v. *National Dairy Corp.*, 372 U.S. 29 (1963). Whatever "the informal arrangements between the agencies" (Pet., p. 15, n. 14), they can hardly override the statutory scheme adopted by Congress, and it is difficult to perceive why cooperation between the two agencies should be as difficult as the Commission implies.

On the other hand, the Commission has chosen to ignore the very real practical problems—of utmost importance in terms of their impact on the Courts of Appeals—which are raised by its proposal that these Courts should be turned into trial courts for the purpose of hearing the Commission's preliminary injunction requests. As the Second Circuit recognized in *International Paper*, the Courts of Appeals have no fact-finding authority. 241 F. 2d at 373. Indeed, they are singularly unsuited for such proceedings. It cannot be assumed that the hearings will be confined to affidavits alone; on the contrary, the recent tendency has been for the preliminary injunction proceeding to partake of "all of the essentials of a trial on the merits." *United States* v. *FMC Corp.*, 218 F. Supp. 817, 823 (N.D. Cal. 1963), *appeal dismissed*, 321 F.2d 534 (9th Cir. 1963); *application for preliminary injunction denied*, 84 Sup. Ct. 4 (1963) (Goldberg, J., in chambers).[18] Thus, the

[18] Recent indications "seem to suggest a governmental attempt to set forth all available evidence at the hearing." Note, *Preliminary Relief for the Government Under Section 7 of the Clayton Act*, 79 Harv. L. Rev. 391, 400 (1965). In *United States* v. *Ingersoll-Rand Co.*, 218 F. Supp. 530 (W. D. Pa 1963), *aff'd*, 320 F.2d 509 (3d Cir. 1963), for example, the hearing took five full days and produced 800 pages of testimony.

Court of Appeals may well be compelled to hold evidentiary hearings. This would entail, among other things, the taking of oral testimony and rulings on the admissibility of evidence. Moreover, whether the case proceeds on affidavits or not, depositions, interrogatories and motions to produce may be requested, in which event the courts would be required to administer and supervise these discovery proceedings.

In sum, the Courts of Appeals would be thrust into the type of hearings and investigatory proceedings which Congress has lodged only in the district courts and the Commission itself. That such a revolutionary change would be undesirable is evident from the fact that the Commission, in its many efforts to secure legislation granting it authority to seek preliminary injunctive relief, has never asked for authority to proceed in the Courts of Appeals. Finally, if this Court chooses to unlock the door to preliminary injunctive proceedings in this case, there is no reason to suppose the Commission will not request similar relief in other merger cases (since it recognizes the instant situation is not an "isolated" one (Pet., p. 8)), or in cases involving alleged violations of other provisions of the Clayton, Robinson-Patman or Federal Trade Commission Acts. Indeed, there is no logic which would deny such relief to other administrative agencies. If such a radical change is to be made in the traditional role of the Courts of Appeals, it should clearly be made by the Congress.

CONCLUSION

For each of the foregoing reasons, we submit that the Commission's petition for a writ of certiorari should be denied and the stay previously issued by this Court should be vacated.

Respectfully submitted,

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Dated: February 9, 1966